

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B023

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MANMOHAN SINGH,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
COLORADO STUDENT LOAN PROGRAM,

Respondent.

Hearing was commenced on December 6, 1994, reconvened on December 19, 1994, and concluded on April 13, 1995, before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Elizabeth Weishaupl, assistant attorney general. Complainant, Manmohan Singh, was present at the hearing and represented by Susan Barnes, attorney at law.

Respondent called the following employees of the Colorado Student Loan Program to testify at hearing: Sue Trujillo; Judy Munshaw; Anita Martinez; Pam Coberly; Karen Mora; and Charles Heim. Complainant testified in his own behalf and called Virginia LaBre, a vocational rehabilitation counselor.

The parties stipulated to the admission of Respondent's exhibits 1 through 12, 16 and 17. Respondent's exhibits 13, 15, 20, 21, and 21a through 27 were admitted into evidence over objection. The parties stipulated to the admission of Complainant's exhibits A through C, F, H through J, L through N, O, P and S. Complainant's exhibits G, U and W were admitted into evidence without objection. Complainant's exhibits E, G, K1 and V were admitted into evidence over objection.

MATTER APPEALED

Complainant appeals the termination of his employment.

ISSUES

1. Whether respondent established by preponderant evidence that complainant did the acts for which discipline was imposed.
2. Whether the decision to impose discipline was arbitrary, capricious or contrary to rule or law.

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3. Whether the decision to terminate complainant's employment was a discipline within the range available to a reasonable and prudent administrator.

4. Whether complainant presented evidence that the decision to terminate his employment was based on race, sex or age discrimination.

5. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. At hearing, on April 3, 1995, the parties made oral closing arguments. In addition to complainant's oral closing argument, he submitted a written summary and asked that the written submission be considered as a part of the closing argument. Respondent objected to the written submission. It was argued that Respondent was not aware a written submission would be offered and that it was not fair to Respondent to accept complainant's submission.

The ALJ accepted complainant's written closing argument and Respondent was given until April 13, 1995, to advise the ALJ whether respondent's counsel wanted to respond in writing to Complainant's submission. If respondent wanted to respond, counsel would be provided additional time in which to do so. On April 13, 1995, respondent's counsel did not notify the ALJ whether counsel wanted to submit a closing argument in writing. Thus, April 13, 1995, was deemed to be the date on which the hearing concluded in this matter.

2. On December 19, 1994, respondent moved to limit the testimony of Complainant's expert witness. Respondent contended that complainant failed to timely endorse the witness and that the witness could not offer relevant evidence. The motion was denied.

3. Respondent argued that Complainant was attempting in this proceeding to challenge corrective actions imposed on January 14, May 23, and June 13, 1994. Respondent argued that the issues raised in the corrective action were not timely grieved and therefore could not be challenged in this proceeding. Complainant argued that it did not intend to challenge the corrective actions in this proceeding for the purpose of overturning those actions. Complainant argued that he intended to establish the arbitrary and capricious nature of the decision to terminate his employment through evidence of the corrective actions.

The ALJ ruled that complainant could present evidence pertaining to the corrective actions for the purpose he described.

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4. Respondent's request to sequester the witnesses from the hearing room was granted. Complainant wanted his expert witness to be permitted to remain in the hearing room during the hearing. Respondent objected. The ALJ ruled that all witnesses would be excluded from the hearing, including complainant's expert witness.

FINDINGS OF FACT

1. Complainant, Manmohan Singh, was employed by the Colorado Student Loan Program (CSLP) from July, 1992, until July 26, 1994. Singh was employed at CSLP as a data entry operator B. Prior to Singh's employment at CSLP, he worked at the Department of Labor and Employment for 8 years where he was also employed as a data entry operator.

2. Singh's immediate supervisor was Sue Trujillo from July, 1992 to April, 1994. From April to July, 1994, Karen Mora was Singh's immediate supervisor. Judy Munshaw was Singh's second line supervisor from November, 1993 to April, 1994.

3. During Singh's employment at the CSLP, he received job performance rating of "good" for the periods from July, 1992, to July, 1993, and from July, 1993, to April, 1994. In July, 1994, Singh received an interim performance rating of "needs improvement" for the period from April to July, 1994. This job performance rating reflected that Singh needed to improve in the sub-categories of problem analysis and decision making, data entry, job knowledge and performance, work habits, customer service, organizational commitment, and adaptability and communications.

4. Singh received corrective actions during his employment at the CSLP. Singh received corrective actions on January 21, May 23 and June 13, 1994. Each corrective action pertained to Singh's failure to accurately input data from student loan applications.

5. As a data entry operator, Singh was expected to verify that all printing jobs were correctly printed and received from the data processing department, distribute computer generated documents to correct lender, school, courier or individual ensuring courier pick up schedules are met. Singh was further responsible for review of computer batch error listings, guarantee request errors and file number error listings and determining the corrective action required to resolve account problems.

6. Singh's duties as a data entry operator also included review of applications to determine interest rates based on federal regulations, determining if corrective information was required prior to loan approval. Singh created the application screen on the computer system. Singh was required to have knowledge of Federal and CSLP regulations and apply those provisions to loan

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applications. Singh also verified that the computer generated correction forms were corrected by reviewing original applications and CSLP computer files. This included adding any notations to assist students, schools and lenders to understand what was needed.

7. Singh was further required as a part of his job duties to enter changes to the student loan records on the computer system and update loan records when cancellations, prepayments, deferments, forbearances and conversions were received from the lender manifest. Singh was also responsible for logging in loan transfer statements received to transfer loans when a lender sells a loan to another lender.

8. Singh verified that the correct loan information was received and he entered the data into the loan records. Singh was responsible for updating the student enrollment status from the information received from the schools. Singh was responsible for researching CSLP computer records and/or documents when account discrepancies arose. He sent out letters requesting clarification and corrective information. Upon receipt of this information, he worked with the senior data processing operator to resolve account problems.

9. Beginning in July, 1992, Singh received training in the performance of his job duties from Sue Trujillo. Trujillo reviewed Singh's work. When Trujillo discovered that Singh made an error, she sat with him at his data entry station and reviewed the error. At the beginning of Singh's employment, Trujillo trained Singh on a weekly basis.

10. The standard in the data processing industry, where the data processing entries made are of great importance, is to assign another employee to routinely check all entries made by data entry operators. It is recognized in the industry that it is very difficult to enter large quantities of information with accuracy. It is further acknowledged in the data processing industry that the only means of ensuring accurate data processing entries is through a two step procedure where the data processor enters the information from raw data and another employee checks the entries against the raw data.

11. Data processing entries made by Singh in the performance of his duties at CSLP were of the utmost importance. Failure to accurately enter information resulted in mis-guaranteed loans. Inaccurate information could result in a student failing to receive the loan or it might result in loan disbursement being made to an incorrect educational institution, to name only a few of the consequences.

12. Despite industry standards, at CSLP, there was no standard review procedure that allowed the data processing work derived

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from raw data to be checked. A system was not in place which assigned employees to check each others' work as a routine part of their job responsibilities.

13. CSLP supervisors Trujillo, Mora and Munshaw spot checked the work performed by the data entry operators under their supervision. Errors came to the supervisors' attention during their spot checks or when the error was discovered by the lending institution. At that time, the supervisor reviewed the work and directed the responsible data entry operator to correct the information.

14. Mora was convinced that Singh made more errors than any other data entry operator employed at CSLP. When she began her supervision of Singh in April, 1994, she closely observed Singh's job performance. On a sporadic basis, she checked the work he completed.

15. From April to July, 1994, Mora concluded that Singh's error rate ranged from 13% to 28%. Mora concluded that other employees at CSLP performing data entry duties had a 5% error rate. However, Mora did not calculate the error ratio in a manner consistent with industry standards.

16. Mora reviewed Singh's work as time permitted her to do so. When she attempted to ascertain Singh's error rate, she counted all the applications assigned to Singh for a given period, she counted all the errors made on the applications and then she determined the percentage of errors made. For example, if Mora assigned Singh 100 applications to enter data from and Singh made 10 errors on one application and zero errors on the remaining 99 applications, Mora concluded that for that batch of work Singh had a 10% error ratio.

17. In determining the percentage of errors made on an application, Mora would count as one error the transposition of driver's license number. On the same application, Mora would consider as another error an incorrect interest rate. Either one of these errors would create a problem in guaranteeing the loan, however, these errors were count as two errors out of the total amount of work completed by Singh.

18. The standard in the industry, in addition to the standard requiring data processor work to be routinely checked, is to ascertain a data processor's error rate by determining the keystrokes used in a given application. After the number of keystrokes is ascertained, the error rate is determined by comparing the errors to the keystrokes.

19. Mora's method of calculating Singh's error rate did not give an accurate picture of Singh's work performance. Based on her calculations, it was not possible to determine how frequently

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Singh made errors as compared to his co-workers. Furthermore, because Singh processed numerous batches of work in the course of a work day, and Mora only calculated error rate for a given day based on one of the numerous batches of work assigned during that day.

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20. Mora attempted to remedy Singh's error rate by assigning him less work. Based on Mora's flawed method of calculating error, she concluded that assigning less work did not reduce the number of errors made. Most significantly, it increased Mora's belief that Singh was less productive.

21. Mora believed that Singh had difficulty with written communications. She claimed that through a random review of the written communications generated by Singh, she observed that his sentence structure, spelling and grammar was below standard.

22. On June 29, 1994, Mora advised Charles Heim, the associate director of legal affairs for the CSLP, that he should consider taking disciplinary action against Singh. In a memo of that date, Mora enumerated the basis for her recommendation that Singh be disciplined. Heim relied on Mora's memo in deciding to meet with Singh for an R8-3-3 meeting. Mora emphasized Singh's alleged incompetence by describing him as an employee having a 13% to 28% error rate and an employee whose actions placed many student loans in jeopardy.

23. After Mora sent Heim the memo recommending disciplinary action, Heim scheduled an R8-3-3 meeting for July 7, 1994. In order to provide Singh additional time to prepare for the meeting, the meeting was rescheduled to July 12, 1994. Singh appeared at the July 12, meeting without representation. Heim was concerned that Singh was not represented and he adjourned the meeting to provide Singh additional time to get representation.

24. Heim rescheduled the meeting to July 15, 1994. On July 15, Singh's attorney, Susan Barnes, contacted Heim to requested that the R8-3-3 meeting be rescheduled to July 18, 1994, to provide her additional time to prepare for the R8-3-3 meeting. Heim agreed and on July 18, Singh, Barnes and Heim met for an R8-3-3 meeting.

25. On July 15, 1994, after the predisciplinary process was underway, Singh was leaving work. Mora observed Singh leaving work and inquired whether he corrected some loan applications in which she had discovered errors. Singh replied, "You find them. You fix them." Singh's reply was uncharacteristic of the communication he had with supervisory personnel and co-workers during his two years of employment at the CSLP.

26. Singh was described by supervisors and co-workers as a relatively quiet worker. Sarcastic retorts were not characteristic of his communications at work. He was described during the period when a supervisor trained him, and thereafter when errors were brought to his attention, as an employee who appeared to accept correction. However, Mora believed that his improved job performance was shortlived and he would soon return

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to making too many errors. Prior to July 15, Mora was not concerned that Singh was belligerent or insubordinate.

27. Singh argued at the R8-3-3 meeting that Mora created a paper trail for the specific purpose of seeking Singh's termination from employment. Singh told Heim that Mora was rude to him, overly critical and that no special consideration was given to him to help him improve his error rate.

28. Singh's July 15, remark to Mora was considered at the July 18, R8-3-3 meeting as a basis for disciplinary action. The remark was considered along with the other allegations of poor job performance. Heim believed that Singh's denial at the R8-3-3 meeting that he made this remark was evidence that Singh was not a truthful person, and that nothing he offered in mitigation could be believed.

29. Heim further considered Singh's employment record which contained three corrective actions imposed for errors Singh made on loan applications.

30. Following the R8-3-3 meeting, Heim decided to terminate Singh's employment. In reaching this decision, Heim concluded that Singh's error rate was too high and that the errors made were serious. Heim concluded that Mora, and other supervisory personnel, exhausted all means to improve Singh's error rate without results.

31. On the basis of this information, Heim decided to terminate Singh's employment effective July 26, 1994.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on the agency in a disciplinary proceeding to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

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Where there is conflicting testimony, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

Respondent argues that this case involves the issue of complainant's failure to accept responsibility for his actions. Respondent contends that complainant's remark to Mora on July 15, epitomized complainant's lack of responsibility toward his job duties. Respondent further argues that complainant's job duties, and those of the other employees of the CSLP, were properly assigned and that there was no need to assign employees to check each other's work. Respondent maintains that complainant's error rate was far too high, higher than other employees performing the same duties. Respondent argues that it should be found that it established by preponderant evidence that complainant did the acts for which discipline was imposed. Respondent maintains that the decision to terminate complainant's employment should be sustained because complainant was previously corrected on three occasions, he failed to improve his job performance and the ramifications of his mistakes were serious and could not be tolerated.

Complainant argues that its expert witness established that Mora's calculation was not only mathematically incorrect, but it was not consistent with industry practices. Complainant contends that he was not given special consideration, but he was hounded, tracked and documented for the specific purpose of removing him from the workplace. Complainant contends that it should be found that CSLP did not have a reasonable standard for judging the performance of data entry operators, and thus termination of complainant's employment on the basis that he failed to comply with an unreasonable standard of performance should be found to be arbitrary and capricious.

The ALJ must agree with Complainant. Respondent failed to prove by a preponderance of the evidence that complainant had an inordinately high error rate. The method used to calculate complainant's error rate was flawed.

The evidence established that while Heim's notice of termination of complainant's employment generally cites the fact that complainant made more data processing errors than other operators, in fact, he testified that his decision to terminate complainant was based on Mora's June 29, memo, in which she claims to have carefully documented complainant's job performance and found him to have an error rate of 13% to 28%.

The testimony of complainant's expert witness, along with common sense, leads to the conclusion that respondent lacked a reasonable

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standard by which to judge complainant's job performance. Further, the evidence established that respondent failed to maintain a data processing procedure which was consistent with the industry standard.

Specifically, it was established that the work performed by complainant was of the utmost importance because it determined whether the State's student loan program was properly administered. It was further established at hearing that the raw handwritten data from which complainant's work was generated was known in the data processing industry to be the type of work which must be checked in each instance because it is most susceptible to error. It was finally established that respondent's procedures and practices were not in keeping with industry practices and standards, and thus complainant could not be shown to have a poor job performance justifying his termination from employment.

Respondent's reliance on complainant's remark to Mora on July 15, "You find them. You fix them.", as evidence of complainant's poor attitude was contrary to the evidence. Complainant's supervisors, Trujillo, Munshaw and Coberly, testified that he made errors, but not one of them described him as insubordinate or difficult to work with. In fact, complainant was described as a quiet unassuming individual, who tried to do his work. It is noteworthy that the July 15, remark was made after the R8-3-3 process began.

This is a time when tensions between a first line supervisor and the employee, who believes he is wrongly accused, tends in most cases to mount.

Heim acted arbitrarily and capriciously by accepting Mora's recommendation to impose discipline on complainant. The appointing authority did not have adequate information from which to conclude that complainant was not performing his job duties. Thus, the decision to terminate complainant's employment based on the information available to Heim cannot be sustained.

Complainant's November 22, 1994, prehearing statement raised a claim of discrimination as an issue to be considered at hearing. However, complainant indicated as a preliminary matter at hearing that he did not intend to pursue this claim and thus evidence of discrimination was not offered at hearing.

Based on the foregoing, complainant is entitled to an award of attorney fees under section 24-50-125.5, C.R.S. The personnel action from which this appeal arose was groundless.

CONCLUSIONS OF LAW

1. Respondent failed to establish by a preponderance of the evidence that complainant engaged in the conduct for which discipline was imposed.

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2. Respondent failed to present sufficient evidence that there was justification for the disciplinary action.
3. The decision to terminate complainant's employment was arbitrary and capricious.
4. Complainant presented no evidence of race, sex or age discrimination.
5. Complainant is entitled to an award of attorney fees and cost.

ORDER

1. Respondent is ordered to rescind the personnel action contained in the letter of July 26, 1994, terminating complainant's employment.
2. Respondent is ordered reinstate complainant, awarding him all back pay, benefits, interest, attorney fees and cost.

DATED this 30th day of
May, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$3569.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing

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party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

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CERTIFICATE OF MAILING

This is to certify that on this 30th day of May, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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